No. 12555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEONARD WOYNICZ, also known as Leonard Woynicz Sianozecki,

Appellant,

vs.

ALEXANDRA WOYNICZ, also known as Alexandra Woynicz Sianozecki,

Appellee.

APPELLEE'S BRIEF.

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Statement of the Case.

The appellant's "Detailed Statement of the Case" [Tr. 4-11] is so incomplete, fragmentary and one-sided that we find it necessary to supplement the same with the following:

The defendant came to this country in 1911 [Tr. 320] and was married to plaintiff in 1916 [Tr. 43]. They resided in New York City. Prior to August, 1942, the parties separated [Tr. 118]. In August, 1942, plaintiff filed an action in the Supreme Court of the State of New York, County of New York, for a legal separation. In connection therewith she served motion papers upon the defendant for an award of temporary alimony and counsel fees for the prosecution of said action [Tr. 85].

The defendant, after an ineffectual attempt to work out a settlement with plaintiff's attorney (in the New York action), retained the New York law firm of Zimmerman and Simon. In charge of the matter was J. Charles Zimmerman, who then had been practicing about 23 years and who was then a judge of the City Court of the City of Long Beach, New York [Tr. 223].

At that time the defendant was president and general manager of the New York Thread Grinding Corporation and had occupied those positions since 1940 [Tr. 84]. He continued in those positions until the dissolution of the corporation in December, 1946 [Tr. 84]. At least 150 people were employed by said corporation which the defendant headed [Tr. 84]. He regularly signed checks as an officer of the corporation [Tr. 84], and executed contracts on behalf of the corporation, especially the "important ones" [Tr. 84]. He devoted full time to his business daily and was on hand supervising the corporation's daily activities [Tr. 84, 85]. In addition thereto he engaged in production conferences [Tr. 85] and took charge of purchasing supplies and materials [Tr. 107]. The defendant admitted on cross-examination that when the matrimonial papers were served upon the defendant he knew from his reading thereof that his wife was suing him for separation; that she was demanding temporary alimony and counsel fees [Tr. 85].

Many conferences were thereafter held between the defendant and Mr. Zimmerman, several of which were attended by Mr. Simon, Mr. Zimmerman's partner [Tr. 251, 253-5]. During August and September, 1942, negotiations were conducted between Mr. Zimmerman and Mr. Klaw, attorney for the plaintiff in the New York action, looking to an amicable settlement of the separation action

and alimony and counsel fees incident thereto [Tr. 226-7, 229-230]. In the course of these negotiations offers and counter-offers [Tr. 230] passed back and forth, all of which culminated in the reaching of an agreement between Mr. Zimmerman and Mr. Klaw for the payment of $50.00 a week support and maintenance, the payment of $350.00 as counsel fees, the conveyance of a life interest in the dwelling then occupied by plaintiff (a two-family house at 2929 Wellman Avenue, Bronx, New York City), and for the discontinuance of the separation action [Tr. 230, 255]. A written separation agreement embodying the terms agreed upon was to be prepared and pursuant thereto each side prepared a draft of the agreement. The defendant admitted on cross-examination that before the final agreement was signed by the defendant he consulted and conferred several times with his attorneys and in the course of these meetings suggested changes, amendments and additions, including provisions relating to the duration of payments to be made by him for support and maintenance, visitation rights in respect to their son Robert, and right of removal of certain personal property belonging to defendant or Robert [Tr. 47, 86, 88, 89, 90, 91].

An agreement in final form was ultimately prepared and signed by both parties [Pltf. Ex. 1, Tr. 44-53]. The defendant executed the agreement in the presence of Mr. Zimmerman and Mr. Simon, his attorneys, and acknowledged his signature before Mr. Simon as notary public [Tr. 10]. At the time he signed the final agreement, which is the basis of this action, Mr. Zimmerman, in the presence of Mr. Simon, went over the agreement with the defendant paragraph by paragraph, during which process defendant indicated by his words and actions that he under-

stood the points under discussion [Tr. 230, 231, 233, 234, 256, 265].

The defendant further admitted on cross-examination that Mr. Zimmerman told him what the New York suit was about, *i. e.,* that the action was one for separation, that his wife was seeking alimony and counsel fees [Tr. 86, 288], and that they discussed "a number of subjects" involved in his wife's suit for separation [Tr. 86]. It was on the defendant's request that a provision in the final draft of the separation agreement giving the wife certain visitation privileges was stricken out [Tr. 89]. At the time he executed the agreement he affixed his initials to such deletion, and in so doing knew at the time he was thus signifying his approval of the change [Tr. 96].

The defendant also admitted that he told Mr. Zimmerman that he did not want the alimony payments to go on forever and objected to the provision in respect thereto embodied in the first draft of the separation agreement [Tr. 90]. He also discussed with his attorney the termination of support payments in the event of his death and requested that a provision to that effect be incorporated in the separation agreement [Tr. 90]. He also admitted discussing with his attorney the subject of terminating payments of support in the event of the wife's remarriage and the subject of counsel fees, to wit, the payment of $350.00 to Mr. Klaw [Tr. 91]. Defendant also admitted discussing with his attorney the effect of the agreement in the event "times went bad" [Tr. 95], and also the conveyance of a life interest to the wife in said real property [Tr. 95, 96].

In his deposition the defendant admitted that he read in part the matrimonial papers that were served upon him and knew and understood from his reading that his wife

wanted a separation; that she was suing therefor and that she was seeking temporary alimony and support [Tr. 289].

The agreement was ultimately signed and the separation action was withdrawn [Tr. 49, 54]. The defendant knew when he signed the separation agreement that as a result thereof his wife's action for separation was to be dropped [Tr. 295].

Contemporaneously with the signing of said agreement the defendant executed three other documents, to wit, a check in the sum of $350.00 [Pltf. Ex. 6, Tr. 92] payable to Mr. Klaw as and for his counsel fees under the separation agreement, a check in the sum of $150.00 [Pltf. Ex. 7, Tr. 93], representing three accrued weekly installments of support pursuant to the separation agreement, and a conveyance of a life estate to the wife in said real property [Tr. 93]. The defendant admitted that in executing these documents he knew at the time what they were for [Tr. 93]; that he was required to pay counsel fees in the amount of $350.00 to Mr. Klaw, and that the separation agreement so required; that three weekly installments of support money were then to be paid, and that the check in the amount of $150.00 constituted payment thereof under the agreement [Tr. 91, 92, 93].

The defendant thereafter continued uninterruptedly to attend to his daily business at New York Thread Grinding Corporation until December, 1946 [Tr. 84]. During the entire interval from September, 1942, to March, 1947, he continued to write checks in payment of the weekly installments accruing under the separation agreement [Pltf. Ex. 10, Tr. 94; 304]. Asked specifically about individual checks the defendant admitted that at the time he executed the checks he knew what they were for and that they

were executed pursuant to the separation agreement [Tr. 93, 94].

In January, 1947, the defendant went to Florida and on March 3, 1947, his Florida attorneys sent plaintiff a letter repudiating the separation agreement [Pltf. Ex. 55, Tr. 55-57]. (It is noteworthy that no claim was advanced in said letter that the defendant was incompetent at the time he signed the agreement or at any other time.)

The defendant's daughter, Mrs. Kuhrke, called by defendant as a witness, corroborated the defendant's admission in the separation agreement [Tr. 44] that he and his wife were living apart at the time of the separation agreement [Tr. 118]. She testified that she attended a meeting at Mr. Zimmerman's office at defendant's request, first alone and then in the presence of the defendant [Tr. 123, 126, 132-133]; that the defendant went to his business every day [Tr. 131]; that he continued to discharge his duties as president [Tr. 131, 135]; and that she saw defendant sign many of the checks for support which were introduced in evidence [Tr. 134]. She testified that the defendant knew when he executed the checks [Pltf. Ex. 10, Tr. 94] in payment of support pursuant to the separation agreement were so required by its terms [Tr. 136].

The deposition of Mr. Zimmerman shows that when retained by the defendant he was a practicing attorney for approximately 23 years and a judge in the City Court of Long Beach, New York [Tr. 223]. He was retained by Mr. Woynicz in August, 1942 [Tr. 225-226].

His deposition gave some of the background of the agreement, *i. e.*, that Mrs. Woynicz was seeking temporory alimony in the sum of $100 per week and counsel fees in the amount of $1,000, and in support of her said claims

asserted that the defendant's means were in excess of $100,000 and his annual income in excess of $15,000 [Tr. 225].

He discussed with Mr. Woynicz the charges asserted in the separation action [Tr. 228] and was asked by the defendant to try to work out a settlement [Tr. 236].

Protracted negotiations looking to an amicable settlement were undertaken [Tr. 226-7, 229-30]. The defendant authorized Mr. Zimmerman to submit a counter-proposition for the payment of $50 a week for support, which was the amount ultimately accepted [Tr. 230]. Many meetings with Mr. Woynicz thereafter took place—upwards of a dozen [Tr. 237, 226-227, 229-230]—in the course of which the contractual obligations were explained by him to the defendant [Tr. 230] and the defendant gave every indication that he comprehended what was being discussed [Tr. 231].

Mr. Zimmerman further testified that the defendant further suggested changes and additions to the draft as he read the proposed draft of the agreement [Tr. 231-232, 239]. The final draft was explained to him paragraph by paragraph and the defendant even objected to one clause and suggested it be stricken out of the final draft [Tr. 234].

The defendant read the conveyance of the life estate called for by the separation agreement and also the checks for counsel fees and accrued installments hereinabove mentioned [Tr. 234-5]. He denied that the subject of Moscow or Moscow trials was ever mentioned or that any imposition, coercion or irregularity was practiced [Tr. 235, 236, 237, 238, 244-249].

At all times Mr. Woynicz spoke English and gave every indication that he understood English [Tr. 237, 239, 245]; that Mr. Woynicz wrote him letters in English [Tr. 237], and that Mr. Woynicz at all times "was rational" [Tr. 240].

The deposition of Mr. Simon substantially corroborates the deposition of Mr. Zimmerman. He testified that he was present at several meetings with Mr. Zimmerman and Mr. Woynicz [Tr. 251]; that Mr. Woynicz signed the final agreement in his presence and that he notarized it [Tr. 252]. That prior to the signing of the final agreement there were discussions with Mr. Woynicz concerning the amount of alimony or support, the disposition of real property, the custody of Robert [Tr. 253-255]; that the sum of $50 a week for support, incorporated in the final agreement, was arrived at after considerable discussion and bargaining [Tr. 255]; that prior to the signing Mr. Zimmerman read each paragraph of the final agreement to Mr. Woynicz [Tr. 256, 265]; and that they all conversed in the English language, which Mr. Woynicz gave every indication of understanding [Tr. 255, 256]; and that the defendant at all times was "rational" [Tr. 256]. The practice of any irregularity or imposition upon the defendant was denied [Tr. 257-266].

The deposition of Mr. Klaw, attorney for plaintiff in the New York separation action, shows that Mr. Woynicz first telephoned personally to Mr. Klaw and offered $20 a week [Tr. 268]; that he spoke to Mr. Klaw in understandable English [Tr. 268]; that many discussions and protracted negotiations ensued between Mr. Klaw and Mr. Zimmerman [Tr. 270-271], and that at the time of the signing of the separation agreement he received a check in the sum of $350 as counsel fees and $150 for

payments accruing under the separation agreement [Tr. 270-273]. The existence of any irregularity or imposition upon the defendant was denied [Tr. 275 *et seq.*].

Dr. Baro, called as an expert witness by the defendant, testified that he first saw the defendant on May 11, 1949 (which was after the filing of this action), and that the only other time he saw the defendant was on March 3, 1950, a few days before he testified as a witness upon the trial [Tr. 139]. Asked by defendant's counsel to give his opinion concerning the defendant's "mental condition during the month of September, 1942," he testified that the defendant was suffering a "reactive depression" [Tr. 145]. This was followed by a question to which objection was made wherein he was asked to *"assume* that the man's condition *remained the same* between September, 1942, and the latter part of 1947," and to state his "opinion as to [the defendant's] mental condition between September, 1942, and the latter part of 1947" [Tr. 145-146]. His answer was that the defendant was "probably slightly improved during that time, but I do not think that he recovered" [Tr. 146]. On cross-examination Dr. Baro testified that the fact that the defendant continued the regular discharge of his duties in charge of the purchasing of materials for the New York Thread Grinding Corporation "has no relevance whatsoever" and no bearing at all on the formulation of his opinion concerning the defendant's mental condition [Tr. 148-149]; that the fact that the defendant regularly signed checks in connection with his business "would not have any bearing" on his opinion concerning the mental capacity of the defendant to execute the agreement in suit [Tr. 149]; that it would make no difference in his opinion that the defendant "issued and knew the purpose of checks in the regular discharge of his duties" [Tr. 149]; or that

the defendant "comprehended the purpose or reason for a check or a particular series of checks" [Tr. 149]. He testified further on cross-examination that the defendant did have the competence to understand that he was being sued for separation [Tr. 150]; that he *was* competent to understand that his wife was asking for temporary alimony in the separation action which she instituted against him [Tr. 150]; that the fact that the defendant understood he was being sued for temporary alimony by his wife "produced, in [his] opinion mental illness" [Tr. 150-151]; that he did not think that the defendant understood at that time that his wife was asking for counsel fees [Tr. 151] (which is at variance with the defendant's own admission that he did know that fact [Tr. 85]); that the nature and extent of the conferences and negotiations that took place between Mr. Woynicz and his attorney, Mr. Zimmerman, and the "subjects discussed" between them—in fact "no matter what they discussed" —would have any bearing on the formulation of his opinion concerning the defendant's mental capacity to execute the agreement in suit [Tr. 152]. He testified further that "even though Mr. Woynicz knew perfectly well that he was signing a separation agreement," in the opinion of the witness the defendant "did not have the competency to execute that separation agreement," and this even though the defendant "discussed each of the clauses with Mr. Zimmerman" [Tr. 152].

He testified it was immaterial that the defendant "insisted on certain changes being made" in the agreement, or that "at the time [the defendant] comprehended what was told to him"; and that the defendant's insistence a provision respecting visitation privileges be stricken out, "would have a bearing to increase [his] belief of incom-

petency, because the man had such a hatred at that particular time towards his wife" [Tr. 152-153].

He testified further on cross-examination that the defendant "certainly" knew that "the separation agreement involved matters of custody"; that "it involved matters of alimony"; that it "involved matters of removing from the premises at 2929 Wellman Avenue"; and that "it also involved matters of removing tools from the house" [Tr. 155]. He testified further on cross-examination that the defendant "probably knew that he had to sign this check" for $350.00 in payment of Mr. Klaw's counsel fees, and knew that it was for counsel fees about to be paid to his wife's attorney, but that "it does not have any bearing upon" his opinion [Tr. 155-156]. This though the "defendant knew that the purpose of that check was the payment of $350.00 which the contract required him to pay to Mr. Klaw" [Tr. 155-156], and though the defendant "comprehended and understood what that check was for, and that it was issued under the contract." The foregoing would have "no consequence whatever" in respect to his opinion [Tr. 156].

Of like nature was his testimony in respect to the check for $150.00 in payment of the three accrued weekly installments specifically called for by the separation agreement [Par. "Sixth," Tr. 48].

Shown a few random checks for weekly support under the separation agreement (out of the bundle of checks marked "Plaintiff's Ex. 10") he testified that with respect to the check dated September 6, 1943, "I feel that he *was* competent to understand what he was doing" [Tr. 157], and that in respect to the check dated October 12, 1942, the witness would give "the same answer" [Tr. 157-158].

SUMMARY OF ARGUMENT.

Appellee contends that the judgment appealed from is eminently proper because:

I.

The Separation Agreement in Suit, Made in New York, Was and Is in All Respects a Valid and Enforceable Agreement Under the Laws of New York Tr. 44-53].

Haas v. Haas, 298 N. Y. 69, 72;

Goldman v. Goldman, 282 N. Y. 296, 300;

Hill v. Hill, 23 Cal. 2d 82;

Hough v. Hough, 26 Cal. 2d 605;

California Civil Code, Sections 158, 159.

II.

The Record Amply Supports the Trial Court's Finding That the Defendant Was in All Respects Competent to Execute the Agreement in Suit.

(a) The evidence establishes overwhelmingly that the defendant knew he was being sued for separation, alimony and counsel fees before he executed the agreement in suit; that he comprehended the nature of the transaction; that he participated in negotiations and conferences with his attorneys, evincing an awareness of what was going on; that he made suggestions for changes in the draft of the agreement; that upon its execution he insisted on the deletion of a paragraph, and knowingly approved the change; that he contemporaneously executed companion documents knowing the purpose and nature of these documents and why they were being executed; and that he

fully comprehended and understood the nature of the transaction (see "Statement of Case," *supra*).

Aldrich v. Bailey, 132 N. Y. 85, 89;

Moritz v. Moritz, 153 App. Div. (N. Y.) 147, 149, 138 N. Y. Supp. 124;

Calligan v. Haskell, 143 App. Div. (N. Y.) 574, 576-7, 128 N. Y. Supp. 293;

Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541;

Haines v. Scott, 35 App. Div. 515, 518-519, 54 N. Y. Supp. 844;

Cleland v. Peters, 70 Fed. Supp. 769;

Riggs v. American Tract Society, 95 N. Y. 503, 511;

Lee v. State of New York, 187 Misc. (N. Y.) 268, 273, 64 N. Y. S. 2d 417;

Holland v. Zollner, 102 Cal. 633;

People v. Manoogian, 141 Cal. 592;

Sneed v. Marysville Gas, etc., 149 Cal. 704, 708;

De Arellanes v. Arellanes, 151 Cal. 443.

(b) The Court was not obliged to discount all the other evidence and to accept the opinion of the expert called by the defendant [Tr. 139-158].

Wirz v. Wirz, 96 A. C. A. 172, 176;

Estate of McCollum, 59 Cal. App. 2d 744, 750;

Bernstein v. Bernstein, 80 Cal. App. 2d 921, 925.

III.

By Reason of His Conscious Performance of the Agreement for a Period of Four and One-half Years, Defendant Is Now Precluded, as a Matter of Law, From Avoiding It Upon the Ground of Mental Incompetence or Other Ground.

City of Reading v. Rae (C. C. A. 3), 106 F. 2d 458, 462; cert. den. 308 U. S. 607;

Northern Pac. Ry. Co. v. U. S. (D. C. Minn.), 70 F. Supp. 836, 865;

Burk v. Johnson (C. C. A. 8), 146 Fed. 209, 217;

Burnes v. Burnes (C. C. A. 8), 137 Fed. 781, 800; cert. den. 199 U. S. 605.

IV.

The Defendant's Repudiation of the Entire Agreement in March, 1947, and His Notice to Plaintiff That He Would No Longer Perform or Abide by Its Terms, Made It Unnecessary for Plaintiff to Give Defendant Notice to Cure His Defaults. Such a Step Was Obviated and Rendered Useless and Futile by Defendant's Announced Repudiation of the Agreement. [Pltf. Ex. 2, Tr. 55-57.]

Shaw v. Republic Life Ins. Co., 69 N. Y. 286, 292;

Flagg v. Fink, 93 App. Div. (N. Y.) 169, 87 N. Y. Supp. 530;

California Civil Code, Sec. 1440;

Monson v. Fischer, 118 Cal. App. 503, 519-520;

Goldberg v. Rempp, 95 Cal. App. 452, 455;

1 Cal. Jur. pp. 343-4.

V.

The Findings and Conclusions Properly Embody the Decision of the Trial Court. In Any Event, the Appellant Has Suffered No Prejudice Whatever by Reason of the Form of the Findings or Conclusions. [Tr. 33-35.]

Rule 52, Federal Rules of Civil Procedure;

Skelly Oil Co. v. Holloway, 171 F. 2d 670 (C. A. Mo.);

Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82;

Klimkiewicz v. Westminster Deposit & Trust Co., 122 F. 2d 957; cert. den. 62 S. Ct. 663, 315 U. S. 805.

ARGUMENT.

POINT I.

The Separation Agreement in Suit, Made in New York, Was and Is in All Respects a Valid and Enforceable Agreement Under the Laws of New York. Agreements Similar to the One in Suit Are Uniformly Held to Be Not Violative of Any Principle of Public Policy and to Be Enforceable Like Other Agreements.

A legion of cases in New York uphold the validity of separation agreements there executed between husband and wife, providing for periodic and regular payments by the husband for the support of his wife. We shall cite merely two of the more recent decisions on the subject handed down by the court of last resort in that State:

Haas v. Haas, 298 N. Y. 69, 72;
Goldman v. Goldman, 282 N. Y. 296, 300.

> "Such agreements, lawful where made, will be enforced like other agreements unless impeached or challenged for some cause recognized by law. It is not in the power of either party acting alone and against the will of the other to destroy or change the agreement." (*Goldman v. Goldman, supra,* p. 300.)

In California too the validity of separation agreements between husband and wife of the kind here involved has become firmly rooted.

Civil Code, Secs. 158, 159;
Hill v. Hill, 23 Cal. 2d 82;
Hough v. Hough, 26 Cal. 2d 605.

In the instant case, the parties had already separated [Tr. 44, 118] and the agreement, far from being promotive of divorce, actually had in view the *discontinuance* of a pre-existing separation action.

POINT II.

The Record Amply Supports the Trial Court's Finding That the Defendant Was in All Respects Competent to Execute the Agreement in Suit.

A person who enters into an agreement in New York cannot repudiate the same on the ground of mental incapacity unless it appears that he was "wholly and absolutely incompetent to comprehend and understand the nature of the transaction" (*Aldrich v. Bailey,* 132 N. Y. 85, 89).

(See also the array of New York and California cases cited under "II" of our "Summary of Argument," *supra,* p. 13.)

No useful purpose would be served in repeating here the detailed narrative of the evidence given herein under our "Statement of the Case," *supra,* pp. 1 *et seq.* Can it be gainsaid that no other conclusion could have been reached on this record than that of the trial court at the close of the trial? The trial court said [Tr. 175]:

> "It seems that the evidence discloses very clearly to the court that he had knowledge and knew what he was doing; he was perfectly competent at the time he signed this separation agreement.
>
> "His conduct, his actions and activities in life from that time on conclusively show that he had knowledge and was perfectly competent in signing the separation agreement."

The appellant contends that the testimony of his expert, Dr. Baro, was entitled to pre-emptive and controlling weight and that all other evidence should have been brushed aside by the trial court in the enforced acceptance

of Dr. Baro's opinion. In this appellant errs. The rule has been thus stated:

Wirz v. Wirz, 96 A. C. A. 172, 176:

"This is in accord with the general rule as to opinion evidence in California which is held not to be conclusive. (*Spencer v. Collins,* 156 Cal. 298, 307 (104 P. 320, 20 Ann. Cas. 49); *May v. Farrell,* 94 Cal. App. 703, 715 (271 P. 789); *Bernstein v. Bernstein,* 80 Cal. App. 2d 921, 925 (183 P. 2d 43); 10 Cal. Jur. 971.) But in *Estate of McCollum,* 59 Cal. App. 2d 744, 750 (140 P. 2d 176), the only medical expert testified that Mrs. McCollum was incompetent to make a will. The court said: 'While this opinion was entitled to be carefully weighed by the trial judge it was not conclusive on the subject, . . . and like the evidence of any other witness could be rebutted by other satisfactory evidence.'"

Estate of McCollum, 59 Cal. App. 2d 744, 750:

"Contestants produced the only doctor who testified in the case. He was general practitioner and testified that in his opinion Mrs. McCollum was incompetent to make a will. While this opinion was entitled to be carefully weighed by the trial judge it was not conclusive on the subject, (*Estate of Arnold,* 16 Cal. 2d 573 (107 P. 2d 25)), and like the evidence of any other witness could be rebutted by other satisfactory evidence."

Bernstein v. Bernstein, 80 Cal. App. 2d 921, 925:

"Here again the trial court had the right to determine the credibility of the witnesses and also what weight should be given the expert testimony. The

court was not concluded by the testimony of the expert pediatrician, and could not give it such weight as the court deemed it was entitled to be given. (10 Cal. Jur. 971.)"

Apart from the defendant's own admissions, the opinion of lay witnesses that the defendant's behavior was rational, was competent and, if believed, could be determinative.

Holland v. Zollner, 102 Cal. 633;
People v. Manoogian, 141 Cal. 592;
Sneed v. Marysville Gas, etc., 149 Cal. 704, 708;
De Arellanes v. Arellanes, 151 Cal. 443.

That any court would give controlling weight to the opinion of Dr. Baro on this record (see narrative of his testimony on cross-examination, *supra,* pp. 9 *et seq.*), is, in our view, rather doubtful.

POINT III.

By Reason of His Conscious Performance of the Agreement for a Period of Four and One-half Years, Defendant Is Now Precluded, as a Matter of Law, From Avoiding It Upon the Ground of Mental Incompetence.

Any act on the part of a contracting party evincing his recognition of a contract as being valid and subsisting, or by way of performance of any of its terms after the alleged disability or vice is removed, constitutes a ratification. He may not be permitted to perform the agreement for a time, or to sit in silence, then at a moment which he deems to be expedient, repudiate the agreement because of

some alleged defect originally in its procuremnt. Out of the host of cases on the subject, we shall cite only the following:

City of Reading v. Rae (C. C. A. 3), 106 F. 2d 458, 462; cert. den. 308 U. S. 607;

Northern Pac. Ry. Co. v. United States (D. C. Minn.), 70 Fed. Supp. 836, 865;

Burk v. Johnson (C. C. A. 8), 146 Fed. 209, 217;

Burnes v. Burnes (C. C. A. 8), 137 Fed. 781, 800, cert. den. 199 U. S. 605;

First Nat. Bk. v. Seldomridge (C. C. A. 8), 271 Fed. 561, 563;

17 Corp. Jur. Sec., pp. 927-928;

New York Tel. Co. v. Jamestown Tel. Corp., 282 N. Y. 365, 26 N. E. 2d 295;

Finesilver v. T. G. & T. Co., 258 App. Div. (N. Y.) 946, 17 N. Y. S. 2d 868;

California Civil Code, Sec. 1588;

6 Cal. Jur., pp. 93-94.

We should like to adopt, for our view of the evidence anent the defendant's performance of the agreement for four and a half years, the following observations of the trial court voiced at the conclusion of the trial [Tr. 175]:

> "Every act in his life for those four years—president of a corporation, been signing checks under this separation agreement, recognizing its validity—he knew what he was doing and knew what had been done."

POINT IV.

The Defendant's Repudiation of the Entire Agreement in March, 1947, and His Notice to Plaintiff That He Would No Longer Perform or Abide by Its Terms, Made It Unnecessary for Plaintiff to Give Defendant Notice to Cure His Defaults. Such a Step Was Obviated and Rendered Useless and Futile by Defendant's Announced Repudiation of the Agreement. [Pltf. Ex. 2, Tr. 55-57.]

In his trial memorandum (Rule 12, Dist. Ct. Rules) the defendant inferentially conceded that his letter of total repudiation in March, 1947 [Pltf. Ex. 2, Tr. 55-57] obviated any requirement for the sending of registered letters to cure the defendant's defaults [Deft. Trial Memo., p. 6, lines 20-25]. Furthermore, the Court was amply justified in finding that any such notices would have been futile, useless and unavailing [Am. and Supp. Complaint, par. IX, Tr. 22; Finding I, Tr. 33].

In any event, where as here one announces his total repudiation of a contract, the other party is not required to send notice of default. Such futility is not required.

Shaw v. Republic Life Ins. Co., 69 N. Y. 286, 292;

Flagg v. Fink, 93 App. Div. (N. Y.) 169, 87 N. Y. Supp. 530;

Civ. Code, Sec. 1440;

Monson v. Fischer, 118 Cal. App. 503, 519-520;

Goldberg v. Rempp, 95 Cal. App. 452, 455;

1 Cal. Jur., pp. 343-4.

POINT V.

The Findings and Conclusions Properly Embody the Decision of the Trial Court. In Any Event, the Appellant Has Suffered No Prejudice Whatever by Reason of the Form of the Findings and Conclusions.

The trial court found all of the averments in the complaint to be true [Tr. 33]. Actually, the matters therein alleged were largely *undisputed,* the defense being one of avoidance, *i.e.,* mental incompetence. The amount of the defaults was not contested. The defendant stipulated in his deposition that he made no payments to the plaintiff other than those set out in the complaint [Tr. 304-306].

There was no need therefore to set forth the entire complaint *in extenso* in the findings. One can easily and readily determine what facts the Court found. Furthermore, the findings expressly recite how the Court found on the issues of incompetence and fraud or other disability [Tr. 33-34], and defendant's *knowing* compliance with the provisions of the agreement for over four years [Tr. 34].

It was not incumbent upon the trial court to make findings on every evidentiary issue, or to negative each rejected contention or averment in the answer.

Federal Rules of Civil Procedure, Rule 52;

Skelly Oil Co. v. Holloway, 171 F. 2d 670 (C. A. Mo.);

Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82;

Klimkiewicz, v. Westminster Deposit and Trust Co., 122 F. 2d 957; cert. den., 62 S. Ct. 663, 315 U. S. 805.

In any event, no prejudice to the defendant whatever is discernible from the form of the findings and conclusions.

Conclusion.

The judgment should be affirmed.

Respectfully submitted,

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